United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2426

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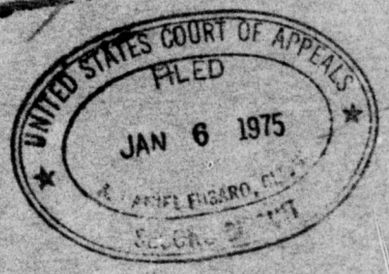
SECOND CIRCUIT

Docket No. 74-2426



CARRIE HAZZARD,

Appellant,

-against-

HON. CASPER WEINBERGER (Secretary of Health Education and Welfare), et al.,

Appellees.

BRIEF FOR APPELLEES WILSON, LEFKOWITZ AND D'ANTONI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
Wilson, Lefkowitz and
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First Assistant Attorney General

DAVID H. BERMAN
Assistant Attorney General
of Counsel

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Statement

Appellant appeals from an order of the United States District Court for the Southern District of New York (Pollack, J.) which inter alia, granted the motion of New York State officials Wilson, Lefkowitz and D'Antoni to dismiss the complaint.

Questions Presented

1. Are the claims against the New York State appellees barred by the Eleventh Amendment?

The court below answered this question in the affirmative.

2. Are the claims against the New York State appellees barred by the doctrine of res judicata?

The court below did not reach this question.

3. Is the State Attorney General a proper party to this Action?

The court below did not reach this question.

Facts and Prior Proceedings

Asserting jurisdiction under the Civil Rights Act, appellant Carrie Hazzard has instituted the present action against a large group of defendants-appellees, including Hon. Malcolm Wilson, Governor of the State of New York, Hon. Louis J. Lefkowitz, Attorney General of the State of New York, and Hon. Albert D'Antoni, Chairman of the New York State Workmen's Compensation Board.

Appellant's suit against these New York State officials is based upon certain compensation claims made by her in connection with injuries which allegedly occurred during her employment by two New York City hotels. As against appellees Wilson and DiAntoni she demands $15,000 for the present value of her compensation award, a declaration of her eligibility for all further disability benefits and whatever amount the court deems appropriate for appellees' "negligence and malfeasance." No damages are apparently sought against appellee Lefkowitz.

The complaint alleges in general language that appellees wilfully conspired to deprive appellant of her rights, privileges and property guaranteed by the United States Constitution and to deprive her of equal protection of the law. The "ultimate object" of this conspiracy was to "subtley murder" her.

This is the second action which appellant has brought in the federal courts against New York State appellees based upon the denial of the aforementioned workmen's compensation claims. In 1972 she sued a group of defendants including, inter alia, the federal Social Security Administration, the States of New York and New Jersey and the New York State

Workmen's Compensation Board. There she alleged a criminal conspiracy between these defendants, the object of which was to deprive her of the aforementioned benefits as well as certain widow's benefits allegedly due her under the Social Security laws as the widow of Wesley Hazzard who died in November, 1967. In that action she sought unspecified disability benefits, the value of the compensation award allegedly due her and damages of $50,000 because of the "negligence and malfeasance" of the appellees.

On December 5, 1972, Judge Marvin Frankel of the United States District Court for the Southern District of New York dismissed the complaint as to all the defendants. Hazzard v. Social Security Administration (H.E.W.), et al., 72 Civil 746. In rejecting Mrs. Hazzard's claims against the New York defendants the court held that any review of the Workmen's Compensation Board administrative proceeding must be pursued through the appropriate vehicle for such relief i.e. appeal to the Appellate Division, Third Department, pursuant to § 23 of the New York Workmen's Compensation Law. In addition, although the court construed plaintiff's pleadings to include a claim under 42 U.S.C. §§ 1983 and 1985, it concluded that the complaint failed to state facts to show a conspiracy. Finally, the unavailability of an alternative basis of subject matter jurisdiction necessitated the granting of defendants' motion to dismiss.

Mrs. Hazzard's appeal to the Second Circuit from Judge Frankel's decision was dismissed on May 21, 1974 for failure to prosecute. (Docket No. 73-1045). An interim application for a writ of certiorari to the United States Supreme Court was denied on January 7, 1974 and on March 18, 1974 the Supreme Court denied a petition for rehearing.

In the action at bar, the State appellees moved to dismiss pursuant to Rule 12(b)(1), 12(b)(2) and 12(b)(6), Federal Rules of Civil Procedure.

A hearing was held on September 13, 1974, before the Hon. Milton Pollack, District Court Judge. By decision dated September 27, 1974, the District Judge dismissed the complaint as to all defendants.

POINT I

THE COURT BELOW CORRECTLY DISMISSED THE ACTION AS AGAINST APPELLEES WILSON, LEFKOWITZ AND D'ANTONI, AS SUCH SUIT IS BARRED BY THE ELEVENTH AMENDMENT.

The law is clear that this suit against these State agents is barred by the Eleventh Amendment. The United States Supreme Court has recently spoken directly to this issue in Edelman v. Jordan, 415 U.S. 651 (1974) where, after thoroughly treating and exploring Eleventh Amendment aspects

of such suits as the case at bar, the Court concluded that "...a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (415 U.S. at 663).

Our case is directly in point. Appellant is suing each of the state appellees solely in his official capacity, and no specific allegations of misconduct are made against any of them. Since a judgment for damages against any of these appellees would be payable out of the public funds of the State, the suit must be dismissed.

POINT II

THIS SUIT IS BARRED BY THE DOCTRINE OF RES JUDICATA.

The doctrine of res judicata is available as a defense where the plaintiff seeks to raise the same issue or issues which have been finally determined in a prior action between the same parties or those in privity with them. Heller v. Cox, 343 F. Supp. 519 (S.D.N.Y. 1972); Ruskay v. Jensen, 342 F. Supp. 264 (S.D.N.Y. 1972). Moreover, one not a party to the prior proceeding may assert this defense "if the party against whom it is raised has had a full and fair opportunity" to contest the issues in the prior proceeding. Ritchie v. Landau, 475 F. 2d 151, 155 (2d Cir. 1973). These

prerequisites are easily met in the instant case and require dismissal of the complaint as against the New York appellees.

Even a cursory comparison of the instant complaint and that filed by Mrs. Hazzard in 1972 and dismissed by Judge Frankel demonstrates that the identical claims are being asserted again. In both complaints the claims against the New York appellees derive from the same unsuccessful workmen's compensation applications and ultimately seek to obtain the compensation benefits which are alleged to have been wrongfully denied in connection with those applications.

It is legally irrelevant that Mrs. Hazzard now characterizes the conspiracy to deprive her of benefits as also intended to "subtley murder" her. Judge Frankel's dismissal of the conspiracy allegations precludes exactly this type of belated, conclusory characterization.

Nor is it relevant that Mrs. Hazzard now casts her claim in terms of the Fourteenth Amendment. Judge Frankel liberally construed the original complaint to include an alleged violation of 42 U.S.C. §§ 1983 and 1985 and held that such a claim must be dismissed for failure to allege sufficient facts. This determination is binding in the instant action.

Finally, the availability of the res judicata doctrine is not affected by the fact that appellant has named three State officials as defendants in the present complaint whereas in the prior action she named the State of New York and the Workmen's Compensation Board. Ritchie v. Landau, supra. No specific ations are ascribed to the three named defendants relative to Mrs. Hazzard's claim for relief. Indeed, as was true of the first complaint, there is a complete absence of factual allegations to support the theory that there was a conspiracy among any of the defendants.*

The history of Mrs. Hazzard's prior litigation demonstrates that she has had a full and fair opportunity to assert her claims in the federal courts. To allow her to relitigate them would be to thwart the res judicata doctrine.

* The conclusory nature of plaintiff's allegations in and of itself requires dismissal of the complaint for failure to state a claim upon which relief can be granted. See Powell v. Workmen's Compensation Board, 327 F. 2d 131, (2d Cir. 1964).

POINT III

ATTORNEY GENERAL LEFKOWITZ IS NOT A PROPER PARTY TO THIS SUIT

Attorney General Lefkowitz is not a proper party to this action under any rationale. Appellant cites no specific acts of the Attorney General, and apparently seeks no damages against him. It is quite evident that the Attorney General had nothing whatever to do with appellant's difficulties. Moreover, the basis upon which relief is sought is here so confused as to warrant dismissal in any event. See Matthews v. Kilroe, et al., 170 F. Supp. 416 (S.D.N.Y. 1959); Rhodes v. Houston, 202 F. Supp. 624, 629 (D.C. Neb. 1962), affd. 309 F. 2d 959 (8th Cir. 1962), cert. den. 372 U.S. 909 (1963).*

Even assuming arguendo that one could imply any acts in relation to appellant, such acts would clearly have been performed in his official capacity as Attorney General of the State of New York and as such are entitled to immunity. Pierson v. Ray, 386 U.S. 547 (1966). See also Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967); Gregoire v. Biddle, 117 F. 2d 579 (2d Cir. 1949), cert. den. 339 U.S. 949.

* It should be noted that appellant's complaints clearly violate Rule 8 of the Federal Rules of Civil Procedure which requires "a short and plain statement of the claim showing that the pleader is entitled to relief..." See Corcoran v. Yorty, 347 F. 2d 22 (9th Cir. 1965), cert. den. 382 U.S. 966, reh. den. 382 U.S. 1002, mot. den. 384 U.S. 923, 388 U.S. 925.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
December 31, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
Wilson, Lefkowitz and
D'Antoni

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID H. BERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for Appellees Wilson, Lefkowitz and D'Antoni herein. On the 31st day of December , 1974 , she served the annexed upon the following named person :

Carrie Hazzard
15 St. James Place - 9F
New York, New York 10038

Appellant pro se
~~Attorney~~ in the within entitled appeal by depositing Three copies a true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Jeanette Marcelina

Sworn to before me this
31st day of December , 1974

David J. Berma
Assistant Attorney General
of the State of New York